F. M. S. REPORTS.

[CRIMINAL APPELLATE JURISDICTION]
AITKEN, J.
May 2, 1938.

PUBLIC PROSECUTOR v. MAN BIN ISMAIL.

(KUALA KANGSAR CRIMINAL CASE No. 30 of 1938)

Section 3 (a) of the Vagrants and Decrepit Persons Enactment (Cap. 191)—Ingredients of offence.

The offence created by section 3 (a) of the Vagrants and Decrepit Persons Enactment (Cap. 191) is made up of three separate elements:—

(i) The wandering abroad, or lodging in a shed etc. or in the open air;

(ii) The absence of any ostensible means of subsistence; and

(iii) The failure of the accused to give a satisfactory account of himself.

Unless all these three elements are specified in the charge and proved to the satisfaction of the Magistrate the accused cannot properly be convicted.

Aitken, J.—I have quashed the conviction in this case in a summary manner, and acting under the "full powers of supervision and revision" conferred upon me by Section 53 of the Courts Enactment. It is unusual, in such cases, to deliver a judgment in open Court; but since this case raises questions of law which are of considerable public importance, I have deemed it desirable to deal with them in a written judgment which will, I hope, be made available to all Police Officers and Magistrates.

At 2 a.m. on the 22nd of April 1938 the accused Man bin Ismail who is a Malay boy, was found asleep under a tree on the bank of the Perak River at Kuala Kangsar by a Chief Inspector of Police. His only clothing was a much worn shirt and a pair of shorts, and he had no money with him. When questioned by the Chief Inspector, he replied that he had been out of work for some time past, and had just arrived at Kuala Kangsar from Kuala Lumpur, having taken five days over the journey. On his way he had kept himself alive by begging for food, and he had saved himself both time and exertion by obtaining lifts from lorry drivers. He told the Chief Inspector that he had come to Kuala Kangsar to look for his father or his uncle. I am not quite clear which—at a place called Lubok Merbau, which is some five miles down river from Kuala Kangsar; and that he thought he had inherited some property from his mother who had died whilst he was away.

Man bin Ismail was arrested and taken to the Police Station at Kuala Kangsar, and next day, the 23rd of April 1938, he was produced before the learned Magistrate at that place upon the following charge:—

> "That you on or about the 22nd of April 1938 at 2 a.m. on the bank of the Perak River at Kuala Kangsar, were found lodging in the open air not having any ostensible means of subsistence: an offence against Section 3 (a) of Cap. 191 of the Laws of the F.M.S."

To this charge Man bin Ismail pleaded as follows:—

> "I came from Kuala Lumpur—sometimes on foot and sometimes by free lifts (given me) by lorry drivers—in search of an uncle. I have no fixed place of abode. I plead guilty to the charge."

The learned Magistrate thereupon recorded a plea of guilty and convicted the accused.

It will be observed that Man bin Ismail was not asked by the learned Magistrate to give any account of himself before he was convicted, and it appears to be another strange feature in this case that as soon as his conviction was recorded, Man bin Ismail was allowed out on bail and the case adjourned to the 25th of April, 1938, so that the Chief Inspector could make inquiries as to the existence and where-abouts of the accused's father or uncle—again I cannot say which.

When the case came before the Court on the 25th of April, 1938, the Chief Inspector summarised the facts for the prosecution in accordance with the account which Man bin Ismail had given to him when he was arrested on the 22nd, and added that no relatives had been found who would "own kinship" with the boy. (From the newspaper reports I gather that the Police had discovered an uncle of Man bin Ismail —presumably at Lubok Merbau—but that the latter had refused to have anything to do with his nephew). The Chief Inspector added that there had been many petty thefts in the Kuala Kangsar district, and that he had reason to believe that such offences were committed by people in the same condition as the accused. There was no suggestion of any previous conviction against Man bin Ismail, but the learned Magistrate proceeded to sentence him to ten days rigorous imprisonment.

Fortunately a report of this case in the Times of Malaya of the 27th of April, 1938, caught my eye, and I telegraphed the learned Magistrate to forward the record to me as soon as possible. The learned Magistrate lost no time in complying with my request, and I received the record next day in the afternoon. In the result, after perusing that record, I telegraphed to the learned Magistrate again quashing the conviction and directing the release of Man bin Ismail from prison. I promised that I would give my reasons for doing so in writing later on.

This completes my statement of the facts out of which this summary intervention on my part arose, and it only remains for me to add that the learned Magistrate recorded his reasons for the sentence he passed upon Man bin Ismail in these words:—

> "The accused pleaded guilty. Section 3 (a) of Cap. 191 provides no option of a fine. As he has no previous conviction, I only sentence him to ten days rigorous imprisonment."

Now Section 3 (a) of the Vagrants and Decrepit Persons Enactment (Cap. 191 of our Laws) provides as follows:—

> "Every person, not being a decrepit, who is found wandering abroad and lodging in any shed or out-house without the permission of the owner thereof, or in any deserted or unoccupied building, or in the open air, or under a bridge or tent or in or under any cart or waggon, or other shelter, not having any ostensible means of subsistence and not giving a satisfactory account of himself, may be arrested without warrant by a Police Officer and shall be liable to imprisonment for six months."

It is of the utmost importance to note that the offence created by this Section 3 (a) is made up of three separate and distinct elements:—

1. The wandering abroad, or lodging in a shed &c or in the open air;
2. The absence of any ostensible means of subsistence; and
3. The failure of the accused to give a satisfactory account of himself.

Thus, unless all these three elements are specified in the charge, and proved to the satisfaction of the Magistrate before whom the accused is brought, the accused cannot properly be convicted of an offence against Section 3 (a) of the Vagrants and Decrepit Persons Enactment.

In this particular case the charge against Man bin Ismail specified only the first two of these three separate and distinct elements, and he was convicted of the alleged offence without being given a chance of putting forward any explanation of his open air sleeping place and his obvious destitution. The procedure in this case was therefore wrong and seriously wrong, and I had no hesitation whatsoever in taking immediate steps to quash the conviction. In a country like this, where public assistance is often unobtainable by those who are destitute and friendless through no fault of their own, the Police should take the greatest care to frame the charge properly if they decide to prosecute under this Section 3 (a) of the Vagrant and Decrepit Persons Enactment, and all Magistrates who hear such charges should carefully consider not only the account of himself which the accused person gave to the Police, but also any account of himself he may desire to give to the Court itself, before they proceed to find their verdict. The legislature cannot have intended to prescribe a sentence of imprisonment as a remedy for honest destitution, however desirable a term of imprisonment may appear to be as an alternative to death by slow starvation outside the prison walls.

It would also seem that the learned Magistrate, who tried this particular case, was under the impression that because the section provides that every person found guilty of an offence against it "shall be liable to imprisonment for six months", therefore he was compelled to pass some sentence of imprisonment on such a person however many mitigating circumstances might be present. If that was his impression, then in my opinion he was under an entirely wrong impression as to the meaning of the words "shall be liable to." To my mind they give the Court an absolute discretion as to whether it shall award a sentence of imprisonment or deal with the accused under and in accordance with the probationary provisions of Section 294 of the Criminal Procedure Code. If the legislature had intended that all persons convicted of an offence against this Section 3 (a) of the Vagrants and Decrepit Persons Enactment should be sent to prison, whatever the circumstances may be, it would have used the expression "shall be punished with imprisonment", which is to be found so frequently in our Penal Code.

Conviction quashed.